UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	)	**Case No.: 06-40015-JJR-13**
William E. Rush,	)	
Debtor;	)	
In re:	)	**Case No.: 05-44868-JJR-13**
Christine Perkins,	)	
Debtor;	)	
In re:	)	**Case No.: 06-40027-JJR-13**
Dorothy African House,	)	
Debtor;	)	
In re:	)	**Case No.: 06-40035-JJR-13**
Marty L. Cook,	)	
Debtor; and	)	
In re:	)	**Case No.: 06-40131-JJR-13**
Gregory Scott Dunston,	)	
Debtor.	)	

MEMORANDUM OPINION ON OBJECTIONS TO CONFIRMATION

On April 5, 2006, the respective chapter 13 plans (individually, a "Plan" and together the "Plans") filed by the above Debtors came before the Court for confirmation. All these cases were filed after October 17, 2005, the effective date for most provisions the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The Alabama Department of Human Resources ("DHR") filed objections to the confirmation of each of the Plans. This Court has jurisdiction in these matters pursuant to 28 U.S.C. §§ 157 and 1334, and the Order of Reference of

the District Court. Confirmation of the Plans and DHR's objections thereto are core proceedings pursuant to 28 U.S.C. § 157(b)(L). For the reasons indicated below, the Court is overruling DHR's objections to confirmation.

FACTS

All of the Debtors have debts for "domestic support obligations" ("DSO") as defined in section 101(14A) of the Bankruptcy Code (11 U.S.C. §§ 101 *et seq*, hereinafter the "Bankruptcy Code" and the "Code"). Each Plan proposes that the Debtor's periodic payments to the standing chapter 13 trustee (the "Trustee") will be disbursed over the duration of the Plan to pay allowed claims, including claims for DSO ("DSO Claims"). Creditors, regardless of their status as priority, non-priority (i.e. general unsecured) and secured creditors, are to receive contemporaneous, periodic disbursements. In most, if not all instances, disbursements from the first several Plan payments are more heavily weighted to the payment of the attorneys' fees due Debtors' counsel. Thus the Debtors' attorneys are paid their fees early in the life of the Plan while other claims are paid over the full duration of the Plans. In some instances, payments to secured creditors are to be made directly by the Debtors and not through the Trustee.

DHR holds DSO Claims in each of these cases. DHR objects to confirmation of the Plans on grounds that the DSO Claims, which are entitled to first priority status

under Code § 507(a)(1), are not being ***paid in full*** before payments are made to other creditors, whether such creditors hold priority or non-priority claims, or secured or unsecured claims. DHR concedes there is one exception to DSO Claims being paid first, that exception being adequate protection payments to secured creditors due under Code §§ 1325(a)(5)(B)(iii)(I) and (II). In other words, according to DHR, the total amount of the initial payments under each Plan must go exclusively to satisfy DSO Claims, with a carve-out to secured creditors for adequate protection payments. DHR specifically complains Plan payments will be made to the Debtors' attorneys before DSO Claims are paid in full. DHR alleges that although attorneys' fees are entitled to priority status under Code § 507(a)(2), priority is one step below the priority status DSO Claims, and therefore the Debtors' attorneys and other section 507(a)(2) administrative claimants must wait until DSO Claims are paid in full before receiving any disbursement from the Trustee.

LAW

Bankruptcy Code § 1322 (a)(2) requires a plan to "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title." DHR, the Trustee, and the Debtors all agree the proposed payments under the Plans must fully satisfy all priority claims to be confirmed. However, the Trustee and Debtors do not agree with DHR that DSO Claims must be paid in full before

payments can commence on other claims.

The simple answer to the issue raised by DHR is found in the plain language of Code § 1322(b)(4), which provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may–
>
> * * * *
>
> (4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim.

A claim is defined in Code § 101(5) as a "right to payment" of virtually every conceivable kind, whether or not secured, and it includes a claim entitled to priority under Code § 507. Thus, section 1322(b)(4) allows payments for claims of differing kinds and priorities to be paid at the same time.

On the other hand, payments in a case filed under chapter 7 of the Bankruptcy Code are treated differently. Code § 726(a) provides that "property of the estate shall be distributed . . . (1) first, in payment of the claims of the kind specified in, and in the order specified in section 507 . . . ." Code § 103(b) limits the application of section 726(a) to chapter 7 cases. Congress could have easily provided a similar requirement for payment of priority claims under plans filed in chapter 13 cases, but instead it provided in section 1322(b)(4), that payment on any claim may be made concurrently with payments on any other claim, without making distinctions between priority, non-priority, secured and unsecured claims. If a chapter 13 case should fail

and is converted to a case under chapter 7 pursuant to Code § 1307, then section 726(a) would require priority claims to be paid in the order prescribed in section 507(a).[1]

Code § 1326(b)(1) adds further support to allowing simultaneous payment of claims of different priorities under a chapter 13 plan. This section provides:

> (b) Before or at the time of each payment to creditors under the plan, there ***shall*** be paid–
>
> (1) any unpaid claim of the kind specified in section 507(a)(2) of this title . . . (emphasis added).

Section 507(a)(2) claims include administrative claims due professionals, such as Debtors' attorneys. Section 507(a) ranks these administrative claims below DSO Claims. Nevertheless under section 1326(b)(1), creditors holding 507(a)(2) claims are to receive payments before or at the same time as other creditors. Unlike section 1322(b)(4), which provides that plans ***may*** provide for concurrent payment on different kinds of claims, section 1326(b)(1) mandates payments to holders of section 507(a)(2) claims either before or concurrently with payment to other creditors. The definition of "creditor" in Code section 101(10) includes a holder of a DSO Claim. Accordingly, DHR's objections to confirmation of the Debtors' plans cannot be sustained based on when Debtors' attorneys are paid under the Plans. The proposed

[1] Code subsections 726(b) and (c) make adjustments to the order of priority otherwise applicable under Section 507, most notably by elevating post conversion subsection 503(b) administrative claims over similar pre-conversion claims.

Plan payments of Debtors' attorneys' fees comply with the provisions of the Bankruptcy Code.

In light of Code §§ 1325(a)(5)(B)(iii)(I) and (II), DHR concedes the Plans may provide for adequate protection payments to secured creditors at the same time payments are being made to holders of DSO Claims. DHR takes the position that any additional payments to secured creditors, beyond what is required for adequate protection, is prohibited until DSO Claims are fully paid. As previously discussed, Code § 1322(b)(4) permits plans to "provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim." Moreover, sections 1322(b)(3) and (5) permit chapter 13 Debtors to cure pre-petition monetary defaults in secured claims by paying the defaults through their plans. In light of subsections (b)(3) and (5) of section 1322, this Court must conclude that the Plans may include payments to secured creditors beyond adequate protection payments (i.e. payments intended to cure pre-petition defaults and maintain post-petition debt service), and Code § 1322(b)(4) permits these payments to be made concurrently with payments to other creditors, regardless of whether such other creditors are entitled to 507(a)(1) priority.

When the plain language of a statute is clear and unambiguous, the Court must enforce that statute "according to its terms." U.S. v. Ron Pair Enter., Inc., 489 U.S.

235, 241 (1989). This Court finds that the language of Bankruptcy Code § 1322 is clear and unambiguous, and it requires a chapter 13 plan to provide for full payment of claims entitled to priority under section 507, but such priority claims may be paid by deferred cash payments at the same time other priority claims, non-priority claims, and secured claims are being paid. The clear and unambiguous language of section 1326(b) requires plan payments be made to section 507(a)(2) administrative creditors no later than when payments are made to other creditors. So long as payments are being made while the case is pending under chapter 13, there is no requirement that priority claims, including DSO Claims, be first paid in full before disbursements to other creditors.[2]

Finally, DHR contends that this Court should construct an equitable remedy prohibiting other creditors from receiving payments under the Plans until the DSO Claims are satisfied. According to DHR, the claim of a creditor who extended pre-petition credit to a Debtor with a delinquent DSO should be subordinated to DSO

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[2] The pre-BAPCA case of In re Aldridge dealt with the same issue now before this Court. 335 B.R. 889 (Bankr. S.D. Ala. 2005). In Aldridge, DHR took the position that section 507 required domestic support obligations of a chapter 13 Debtor to be paid in full before payments could be made under a plan to other creditors. The Aldridge Court determined that nothing in the Bankruptcy Code required payments under a chapter 13 plan to first satisfy priority claims before distributions commence to holders of other kinds of claims. The Court in Aldridge stated, "DHR filed this motion for instruction before the BAPCPA was enacted. Accordingly, the ruling in this case will only apply to cases filed before October 17, 2005." 335 B.R. at 891, n. 1. Nevertheless, this Court is of the opinion that if Aldridge had been decided after BAPCPA became effective, the result would be the same.

Claims. DHR accuses such a creditor of bad faith for having extended credit to someone who is not supporting his or her children or former spouse. DHR assumes a routine credit report or other available means, allows creditor to be informed of a Debtor's delinquent DSO; however, no proof was offered to support this assumption, and no evidence was presented that any of the creditors in these cases were aware of the outstanding DSO of the Debtors at the time pre-petition credit was incurred. Apparently DHR is asking the Court to invoke Code § 510(c) and equitably subordinate the claim of any creditor who extended pre-petition credit to a Debtor when the creditor knew, or should have known, of the delinquent DSO. This is a novel theory, and, if adopted, there is no reason it could not be expanded to any creditor who knew, or with diligent inquiry should have known, about delinquent pre-petition debts, DSO or otherwise. Because delinquent DSO indicates a Debtor is neglecting his or her children or former spouse, DHR argues DSO should be distinguished from other obligations. However, without further evidence of bad faith beyond mere extension of pre-petition credit by a creditor with knowledge of a Debtor's delinquent DSO, this Court is not prepared to find that equity or any provision of the Bankruptcy Code requires subordination of the claims of such a creditor.

DHR's theory of equitable subordination might be an appropriate remedy if

there was proof of collusion between the creditor and Debtor. This Court would consider subordinating a creditor's secured claim if, for example, it was shown that, immediately before filing bankruptcy, the Debtor purchased an expensive automobile with the understanding the related purchase money secured claim would be paid through a chapter 13 plan and dilute the Debtor's disposable income otherwise available to pay DSO Claims or other priority claims. Here however, there is no evidence on the Debtors' Forms B22C, Statement of Current Monthly Income, that their disposable incomes have been reduced because of monthly payments on secured claims for luxury items.

CONCLUSION

For the foregoing reasons, the Court concludes that DHR's objections to confirmation of the Plans are due to be overruled.[3] Pursuant to Fed. R. Bankr. Proc. 9021, separate orders will be entered in each of the above cases overruling DHR's objection to confirmation of the Plans proposed in each such case, and resetting a hearing on confirmation of the Plan and the Trustee's objection to confirmation.

Dated: April 27, 2006

/s/ James J. Robinson
JAMES J. ROBINSON
United States Bankruptcy Judge

[3] While DHR's objections to confirmation of the Plans proposed in the above cases were under consideration, Judge Jack Caddell, in a well reasoned opinion, reached the same conclusion as that set forth herein regarding payment of section 507(a)(1) claims under chapter 13 plans. In re Sanders, 2006 WL 1000461 (Bankr. N.D. Ala. Apr. 18, 2006).

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
	}	
MICHAEL L. DEW,	}	**CASE NO.: 06-40154-JJR-13**
	}	
Debtor,	}	**CHAPTER: 13**
	}	
In re:	}	
	}	
PAUL A. and BETTY M. ETRESS,	}	**CASE NO.: 06-40134-JRR-13**
	}	
Debtors,	}	**CHAPTER: 13**
	}	
In re:	}	
	}	
APRIL L. WILSON	}	**CASE NO.: 05-44792-JJR-13**
	}	
Debtor,	}	**CHAPTER: 13**
	}	
In re:	}	
	}	
TONETT S. WELLS,	}	**CASE NO.: 06-40207-JJR-13**
	}	
Debtor, and	}	**CHAPTER: 13**
	}	

MEMORANDUM OPINION

The above cases came before this Court for confirmation of the respective Debtors' chapter 13 plans.[1] All these cases were filed after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") became effective. The chapter 13 Trustee filed an Objection to Confirmation in respect to each proposed plan. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(b). This is a core proceeding in accordance

[1] The same attorney represents all the above Debtors. The Trustee's Objections to Confirmation of the plans proposed in these cases raise common issues, and the Trustee and Debtors' attorney combined their arguments and briefs on these issues. Accordingly, the Court is issuing this memorandum opinion covering the common issues in these cases.

with 28 U.S.C. § 157(b).

THE PROPOSED PLANS, SCHEDULES I & J AND FORMS B22C

To fully analyze the issues presented, it is helpful to first examine some of the details of the proposed plans. In his plan, Debtor Dew proposes to pay $140 per week (increasing to $202.00 per week in June 2006) for 15 months. The payments will be applied exclusively to priority claims, attorney's fees and delinquent income taxes; general unsecured creditors will receive nothing. Dew proposes to pay a $1,000 secured claim directly to a secured creditor with monthly payments of $268.00. On Schedule J, Dew reports total monthly income of $3,243.33 (line 20 a) and total monthly expenses of $2,635.00 (line 20 b), leaving monthly net income of $608.33 (line 20 c). The Trustee asserts that Dew's plan should not be confirmed because the length of its proposed commitment period is less than three years, and he is not offering to contribute all his monthly net income to the plan payments.[2]

Debtor Wilson proposes to pay $100.00 per month for 21 months. The plan is unclear as to how Wilson intends for her payments to be applied. Her attorney's fees are $1,800.00, and she has scheduled a student loan as a priority claim in the amount of $9,301.56. While her student loan might not be discharged under section 522(a)(8) of the Bankruptcy Code (11 U.S.C. §§ 101 *et seq*, the "Bankruptcy Code" and the "Code"), it does not appear to be entitled to priority claim status under section 507 of the Code, as alleged by this Debtor. The total amount she proposes to pay over the life of the plan is only $2,100.00, significantly less than the fees of her attorney and her student loan. In any event, general unsecured creditors will receive nothing. On Amended Schedule J,

[2]The Trustee assigned addition reasons for her objection to confirmation of Dew's plan, including that his budget (i.e. expenditures) is excessive. This opinion only speaks to the objections based on the insufficient duration of the plan's commitment period and the Trustee's claim that Dew's budget is excessive.

Wilson reports total monthly income of $1,135.53 and total monthly expenses of $1,035.00, leaving monthly net income of $100.53. Like her objection to Dew's plan, the Trustee objects to confirmation of Wilson's plan on the grounds that it proposes payments over a term of less than three years.

The Etress Debtors propose to pay $232.00 per month for 36 months. The payments will be applied exclusively to their attorney's fees and the secured claim of the creditor holding a security interest in their automobile; general unsecured creditors will receive nothing. Schedule J discloses the Etress Debtors have total monthly income of $2,737.54 and total monthly expenses of $1,500.00, leaving monthly net income of $1,237.54.

Debtor Wells proposes to pay $1,008.00 per month plus $240.10 bi-weekly for 60 months. The payments will be applied exclusively to her attorney's fees and the secured claims of the creditors holding security interests in her home and automobile; general unsecured creditors will receive nothing. Schedules J discloses that Wells has total monthly income of $3,832.17 and total monthly expenses of $1,004.00, leaving monthly net income of $2,828.17.

All the Debtors included Forms B22C with their petitions for relief. Interim Rule 1007(b)(6) of the Federal Rules of Bankruptcy Procedure requires a chapter 13 debtor to report his or her current monthly income in Part I of Official Form B22C, and in Part II to determine whether or not this income is less or more than the median family income for the debtor's state and household size. If the income is greater than the applicable median, then disposable income must be calculated in accordance with section 1325(b)(3) of the Code by completing Parts III, IV and V of Form B22C. If income is less than the median, the instructions in line 14 of the Form tell the debtor not to complete the remainder of the Form other than the verification in Part VI.

In Part II of their Forms B22C, all of the Debtors in these cases reported that their current

monthly income was less than the median income for their applicable family size in Alabama. Nonetheless, contrary to the instruction in line 14, they each completed the entire Form B22C, including Parts III, IV and V. The calculations of disposable income in Forms B22C, as completed by the Debtors, leave each of them with negative monthly disposable income (i.e. Form B22C line 48).[3]

WHY CHAPTER 13 AND NOT CHAPTER 7?

Without making a detailed analysis, it appears from these Debtors' Schedules and Forms B22C, that all of them were eligible to seek relief under chapter 7 of the Bankruptcy Code with no presumption of abuse under section 707(b). If they had filed under chapter 7 most, and in some cases all, their debts would be dischargeable without further payment. So why did they file under chapter 13 which will require payments to the Trustee under a plan? The answer is simple. As is often the situation, a debtor files for relief under chapter 13 rather than 7 to cure outstanding defaults in secured debts such as home mortgages and automobile loans. This allows a chapter 13 debtor to take advantage of the automatic stay while curing defaults in secured debts and stop foreclosures and repossessions. It also halts the imposition of judgments and their enforcement through levy, execution and garnishment. At the end of a successful and completed chapter 13 plan, a debtor hopes to have cured defaults in his or her secured debts, and receive a discharge of general unsecured debts, even if these latter debts were not fully, or even partially paid under the plan.

Another example of why a debtor may choose chapter 13 and not 7 arises when a debtor finds

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[3] Even ignoring that these Debtors all have below median income, they failed to properly complete Parts III, IV and V of their Forms B22C. For example, most of the line item deductions allowed in Part III were left blank, no total deductions were inserted in lines 42, and it was impossible to reconcile the total of all allowed deductions on lines 46. Additionally, Debtors Dew and Wilson inserted the total amount of their proposed priority claims in line 39 without dividing that amount by 60 as instructed. Nonetheless, for the purposes of this opinion any errors in completion of Forms B22C will be ignored, and it will be assumed that all these Debtors would have negative monthly disposable income reported on line 48 if the form had been accurately completed.

that his or her exemptions are not sufficient to protect the unencumbered value in property the debtor desires to retain. This property would otherwise be subject to liquidation by a trustee in a chapter 7 case. Similarly, a debtor might have debts that would not be discharged under chapter 7, but under chapter 13 he can pay these debts over an extended period of time, thus avoiding harsh collection remedies that might be employed by creditors holding nondischargeable claims, e.g. domestic support obligations, delinquent income taxes and student loans. While the motives of the Debtors in these cases are not at issue, it appears that in most instances they are attempting to cure defaults in secured loans (e.g. Wells and Estress), and avoid or delay the enforcement of nondischarageable debt (Dew and Wilson). However, at the conclusion of their plans, these Debtors expect to receive a full discharge from the claims of their nonpriority, unsecured creditors, even though these creditors will receive nothing.

PLAN COMMITMENT PERIODS AND

PROJECTED DISPOSABLE INCOME FOR BELOW MEDIAN DEBTORS

Debtors Dew and Wilson propose plans with terms of less than three years. The term of Wilson's plan is 21 months, and Dew's is only 15 months, and neither plan proposes to pay anything to nonpriority, unsecured creditors. The Trustee contends that the Wilson and Dew plans cannot be confirmed over her objection because they do not satisfy the requirements of section 1325(b)(1) of the Bankruptcy Code. Section 1325(b)(1) states that when the trustee or a holder of an allowed unsecured claim objects to the confirmation of a chapter 13 plan, "then the court may not approve the plan unless . . .

> (A) the value off the property to be distributed under the plan on account of such claim is not less than the amount of such claim [i.e. pay the claim in full]; or
>
> (B) the plan provides that all the debtor's *projected disposable income* to be

> received in the *applicable commitment period* beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." (emphasis added).

The Trustee then points to section 1325(b)(4), which defines "applicable commitment period" as three years for below median income debtors. She argues that because the Dew and Wilson plans are for periods of less than three years, they should not be confirmed.

Debtors Dew and Wilson contend that the duration or length of their plans is immaterial since they have no monthly disposable income reported on line 48 of their Forms B22C**.** According to Dew and Wilson, because they have no obligation to pay anything under Form B22C, the duration of their plans is of no consequence.

Section 1325(b)(2) provides that "disposable income" is determined by subtracting from "current monthly income[4]" the reasonably necessary expenses incurred for the maintenance and support of the debtors and their dependants, charitable contribution (within limits), and if the debtors are engaged in business, necessary business expenses. Thus, a debtor's current monthly income is the starting point for determining his disposable income under section 1325(b)(2). However, current monthly income is also important for two other reasons: (1) selecting the method for determining the expenses that will be subtracted from current monthly income to calculate disposable income, and (2) selecting the term or duration for debtor's plan, i.e. the applicable commitment period. If current monthly income, multiplied by 12, is greater than the applicable median, then the deductible expenditures for the calculation of disposal income are determined in accordance with section 707(b)(2)(A)&(B). Code § 1325(b)(3). Likewise, if the debtor's current monthly income, multiplied

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[4]Generally speaking, current monthly income is defined in Code § 101(10A) as the average monthly income from all sources received by the debtor(s) during the six calender months immediately preceding the month in which the petition was filed.

by 12, is greater than the applicable median, then the applicable commitment period for his plan is five years, as opposed to three years for a below median income debtor. Code § 1325(b)(4). The only exception to the five and three year requirements is "if the plan provides for payment in full of all allowed unsecured claims over a shorter period." Section 1325(b)(4)(B).

For any particular debtor, disposable income in section 1325(b)(2) is not necessarily the same as projected disposable income in section 1325(b)(1)(B). See In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006). To hold otherwise would assign no meaning to the term "projected", which would be contrary to rules of statutory construction. However, exactly how and to what extent the adjective "projected" modifies disposable income is not an issue this Court needs to address before ruling on the Trustee's objections to confirmation of the Debtors' plans in these cases. It is enough to say that if a debtor's income and expenses have been relatively constant and there is no reasonable expectation of substantial changes or fluctuations (unlike the situation which arose in In re Beasley, 2006 WL 1228924, Bankr. C.D. Ill. May 8, 2006), then projected disposable income and disposable income will in virtually all, if not all cases be the same.

As mentioned above, none of these Debtors has currently monthly income greater than the applicable median income. Thus, these Debtors' disposable incomes are not to be determined under the Form B22C formula, which was taken from Code § 707(b)(2)(A)&(B). If the Form B22C formula for determining disposable income is not applicable, how should a below median income debtor's disposable income be calculated? The answer appears to be -- the old fashioned way:

> "Unlike the higher income debtor, it does not appear that Congress has mandated monthly net income as the presumptive amount debtors must pay into a chapter 13 plan, preserving judicial discretion in that respect. Accordingly, for debtors in this category one might correctly assume that the courts will continue to apply the pre-

BAPCPA approach. " T. Yerbich, Consumer Bankruptcy 98 (2d ed. 2005 American Bankruptcy Institute).

This Court holds that in determining whether a below median income debtor is offering all of his projected disposable income under a plan, the first step, and in most cases the last step, is to look at the debtor's Schedules I and J. If the Schedules are accurately completed in good faith and plan payments are substantially the same as the debtor's monthly net income shown on Schedule J, then the Court will conclude that the debtor is offering his projected disposable income under his plan as required by Section 1325(b)(1)(B). If a party in interest contends that the amount of monthly net income shown on Schedule J of a below median income debtor should not be considered as the debtor's projected disposable income for the purposes of determining compliance with Code § 1325(b)(1)(B), then for this Court to approve a different amount, that party must be prepared to present credible evidence that proves monetary adjustments in exact amounts are necessary, without resorting to conjecture, opinion, speculation or hearsay. As stated above, in the overwhelming number of cases, the accurate information on Schedules I and J offered in good faith for below median income debtors will determine their "projected disposable income to be received in the applicable commitment period . . . ." Section 1325(b)(1)(B). Thus, the Debtors' "'projected disposable income' must be based upon the debtor's income during the term of the plan, not merely an average of [his or her] prepetition income." In re Hardacre, 338 B.R. at 722.

The plain meaning of section 1325(b)(4)(A) sets the applicable commitment period for below median debtors at three years. Where the words of the statute are clear and unambiguous, it should be interpreted as written. See Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); Dodd v. U.S., 125 S. Ct. 2478 (2005). The Court is convinced that the three years referred to in section 1325(b)(4)(A) represents a period of time over which chapter 13 plan payments must be made, not a multiplier for

use in calculating the total amount to be paid under the plan regardless of its term. The hanging paragraph at the end of Code § 1322(d)(2) states "the plan [of a below median income debtor] may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period," not to exceed five years. A plan modification made pursuant to section 1329(c) "may not provide for payments over a *period that expires* after the *applicable commitment period* under section 1325(b)(1)(B) after the *time* that the first payment under the original confirmed plan was due, unless the court, for cause, approves a *longer period* . . . ." (emphasis added). Inasmuch as sections 1322(d)(2) and 1329(c) deal with extending the duration of a plan confirmed under section 1325, the only logical conclusion is that the applicable commitment period under section 1325(b)(4)(A) must be a period of time: either three or five years, depending on the median income of the debtor. It is impossible to read sections 1322(d)(2), 1325(b)(4)(A) and 1329(c) and conclude the Bankruptcy Code contemplates something other than a defined length of time for payments to be made under a chapter 13 plan, i.e. the applicable commitment period.[5] When a below median income debtor has positive monthly net income shown on his Schedule J, even if he would have no monthly disposable income under Form B22C, in virtually all cases an amount substantially equal to such monthly net income will be considered the debtor's projected disposable income for the purposes of Code § 1325(b)(1)(B). Thus, a plan proposed by a debtor with a commitment period of less than three years should not be confirmed over the objection of the Trustee or an unsecured creditor, unless the plan will pay unsecured creditors in full in less than three years.

[5]Similarly, Code § 1322(a)(4) provides for the payment of section 507(a)(1)(B) priority claims over a "5-year period," the maximum allowed term of a chapter 13 plan. Further, calculations made under Code § 1326(b)(3)(B)(ii) utilize the "number of months in the plan."

COMMITMENT PERIODS FOR DEW'S AND WILSON'S PLANS

Over the proposed 15-month term of Debtor Dew's plan, he will pay a total of $9,100. If his commitment period is increased to three years, his total will increase to approximately $21,840.[6] Similarly, Debtor Wilson's 21-month plan will pay a total of $2,100, but if the commitment period is increased to three years, her total payout becomes $3,600.[7] Accordingly, the Trustee's objections to the plans proposed by Debtors Dew and Wilson are due to be SUSTAINED, because both plans fail to propose payments over the applicable commitment period of three years, and neither will pay unsecured creditors in full over their abbreviated terms.

PROJECTED DISPOSABLE INCOME OFFERED BY ETRESS AND WELLS PLANS

The plan proposed by Debtor Etress has a commitment period of three years, and the Wells plan has a term of five years. The Trustee is not objecting to the length of the commitment periods of these two plans.[8] However, the Trustee contends the Etress and Wells plans do not offer to pay all the projected disposable income of their respective Debtor. A comparison of the proposed plan payments with the reported monthly net incomes on Schedule J supports the Trustee's objections to

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[6]Dew's plan payments calculated on a monthly basis are approximately $606, and his monthly net income show on Schedule J is $608. Assuming the income and expenditures used to complete Schedules I and J are accurate and offered in good faith, it appears the proposed periodic payments would substantially comply with section 1325(b)(1)&(2) for 15 months, but the proposed commitment period of 15 months is 21 months short from that required by section 1325(b)(4)(A).

[7]Wilson's Schedule J reports monthly net income of $100. Thus if her income and expenditures used to complete her Schedules I and J are accurate and offered in good faith, it appears her monthly contribution is sufficient, but the term of the plan must be increased to three years.

[8]Section 1322(d)(2) limits the term of a below median income debtor to no more than three years unless the court, for cause, approves a longer period not to exceed five years. The Wells plan proposes a commitment period of five years, although the Debtor has not sought and the Court has not approved a longer period. This Court makes no ruling on the consequences, if any, of a commitment period extending beyond three years for a median income debtor where, as here, the Court has not approved the longer period and neither the Trustee nor any other party in interest has objected to the longer period.

confirmation.[9] Thus, the Trustee's objections to confirmation of the plans proposed by Debtors Etress and Wells are SUSTAINED, because they do not offer all of the Debtors' disposable income to be received during the applicable commitment period. Code § 1325(b)(1)(B).

Separate orders consistent with this opinion will be entered in each of these cases. The Clerk will be directed to re-schedule each case for plan confirmation and consideration of whatever proof the parties might wish the Court to review in support of, or in opposition to confirmation, consistent with the opinions expressed herein. The Debtors are granted leave to amend their proposed plans to comply with this opinion.

Dated: May 31, 2006

/s/ James J. Robinson
JAMES J. ROBINSON
United States Bankruptcy Judge

[9]The Trustee contends that the budget proposed by Debtor Dew is excessive, resulting in his plan not offering to pay all his disposable income. The Court assumes the Trustee is complaining that the expenditures shown on Dew's Schedule J are excessive, and that if they were reduced to reasonable amounts there would be a corresponding increase in the monthly net income available to make payments to unsecured creditors. Without further proof, the Court makes no findings regarding the expenditures reported on Dew's Schedule J. This issue as it applies to this Debtor will be determined when a hearing on confirmation is re-scheduled.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
BARRY E. PATTERSON and	}	
LISA T. PATTERSON,	}	**CASE NO. 06-40767-JJR-13**
	}	
Debtors.	}	**CHAPTER: 13**
	}	

MEMORANDUM OPINION

The above chapter 13 case was filed in the Northern District of Alabama, Eastern Division on June 5, 2006. These debtors have had four prior bankruptcy case, all of which were filed in the Middle District of Alabama. According to the debtors' petition, they reside in Goodwater, Alabama. The City of Goodwater is located within Coosa County, Alabama, and Coosa County is part of the Middle District of Alabama, rather than the Northern District. Thus, the debtors should have filed their petition in the Middle District of Alabama, Northern Division. A hearing was set for June 13, 2006 for the debtors to show cause as to why this case should not be transferred to the proper district. According to the debtors' attorney's proffer of evidence at the hearing, the debtors filed their petition in the Northern District, Eastern Division because this court, located in Anniston, Alabama, is geographically closer in proximity to the debtors' residence than the correct court of the Middle District of Alabama, Northern Division, which is located in Montgomery, Alabama. However in reality, Anniston is about 50 miles from Goodwater, and Montgomery is only about 60 miles from Goodwater; thus, the travel distance is not necessarily any more inconvenient. The debtors had no extenuating circumstances which would make travel to the Middle District an undue burden on them.

As noted on prior occasions, this Court has jurisdiction to transfer venue of the instant case,

pursuant to section 157(b)(3) of the Bankruptcy Code, because this is a core proceeding arising in a title 11 case. *In re Henderson*, 197 B.R. 147, 150 (Bankr. N.D. Ala. 1996).

This Court finds the Northern District of Alabama, Eastern Division is not the proper venue for the debtors' instant case. Pursuant to section 1408(1) of Title 28, a bankruptcy case may be commenced in the district in of the debtors' domicile, residence, principal place of domestic business, or principal place of domestic assets for the requisite period set forth in the statute. The Debtors' residence, as listed on their petition, is 11310 Highway 63 North, Goodwater, Alabama 35072. There is no evidence in the record to suggest any prior residence during the requisite period that would give rise to venue in this District. According to the debtors' schedules, they own a mobile home and lot in Goodwater, Alabama. Thus, the Middle District of Alabama is the proper venue for the Debtor's case.

Upon finding the petition was filed in an improper venue, the Court must determine how to handle this case. Bankruptcy Rule 1014 states that a court may transfer a case "on timely motion of a party in interest . . . and after hearing on notice to the petitioners, . . . the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties. " As stated above, it appears to be no more inconvenient for the debtor to attend court in Montgomery rather than Anniston, as Montgomery is the proper legal division for this case and is only about 10 miles further away than Anniston. When determining whether the case should be transferred in the "interest of justice," the court must consider the following factors: "(1) economics of estate administration; (2) judicial efficiency; (3) ability to receive fair adjudication; (4) enforceability of judgment; and (5) original choice of forum." The debtors' previous cases were filed in the Middle District, and the debtors should not be permitted

to forum shop. The estate will be administered more efficiently in the District in which the debtors reside, and it appears the debtors might have filed bankruptcy in the Northern District because they have had four previous cases dismissed in the Middle District. Nevertheless, the debtors can receive a fair adjudication of their bankruptcy case in the Middle District, and there is no reason the case should not be transferred there. This court does not take business away from another district unless justice so requires.

Absent a request by a party in interest, this Court must consider if it can *sua sponte* transfer a case to the proper venue. In prior cases dealing with this same issue, this Court has answered the question in the affirmative. *See In re Henderson*, *supra*; *In re Langston*, 291 B.R. 872 (Bankr. N.D. Ala. 2003) (holding the Court has the power to transfer on its own motion a bankruptcy petition filed in the improper venue to the proper district); *see also In re Peterson*, case no. 02-44477, Northern District of Alabama, Eastern Division (appealed and affirmed by District Court) and *In re Bass*, case no. 03-40049, Northern District of Alabama, Eastern Division (appealed and affirmed by District Court). Bankruptcy courts have the authority to transfer improperly filed cases under 28 U.S.C. § 151, which names bankruptcy judges in a district "a unit of the district court." *Henderson*, 197 B.R. at 153. In addition, bankruptcy courts also may exercise certain district court powers "pursuant to the referral of cases to be heard and determined by the bankruptcy court." *Id.* at 153-54, *citing Burlingame v. Whilden (In re Whilden)*, 67 B.R. 40 (Bankr. M.D. Fla. 1986); *In re Oceanquest Feeder Serv., Inc.*, 56 B.R. 715 (Bankr. D. Conn. 1986); and *In re Waits*, 70 B.R. 591 (Bankr. S.D. N.Y. 1987).

Statutory law also favors transfer. Section 1404(a) of Title 28 provides, "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to

any other district or division where it might have been brought." A district court also may dismiss, or in the interest of justice, transfer a case filed in the wrong division or district. 28 U.S.C. § 1406(a). Section 1412 also governs transferring bankruptcy cases and provides, "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. The Court has no evidence before it to suggest or support a finding contradicting binding precedent.

Based on the foregoing reasons and conclusions stated, it is ORDERED, ADJUDGED and DECREED that the debtors' case is to be transferred *sua sponte* to the correct venue of the Middle District of Alabama, Northern Division in Montgomery, Alabama. Pursuant to Fed. R. Bankr. P. 9021, a separate order consistent with this opinion will be entered in this case.

Dated: June 13, 2006

/s/ James J. Robinson

JAMES J. ROBINSON

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
BARRY E. PATTERSON and	}	
LISA T. PATTERSON,	}	**CASE NO. 06-40767-JJR-13**
	}	
Debtors.	}	**CHAPTER: 13**
	}	

AMENDED MEMORANDUM OPINION

The above chapter 13 case was filed in the Northern District of Alabama, Eastern Division on June 5, 2006. These debtors have had four prior bankruptcy case, all of which were filed in the Middle District of Alabama. According to the debtors' petition, they reside in Goodwater, Alabama. The City of Goodwater is located within Coosa County, Alabama, and Coosa County is part of the Middle District of Alabama, rather than the Northern District. Thus, the debtors should have filed their petition in the Middle District of Alabama, Northern Division. A hearing was set for June 13, 2006 for the debtors to show cause as to why this case should not be transferred to the proper district. According to the debtors' attorney's proffer of evidence at the hearing, the debtors filed their petition in the Northern District, Eastern Division because this court, located in Anniston, Alabama, is geographically closer in proximity to the debtors' residence than the correct court of the Middle District of Alabama, Northern Division, which is located in Montgomery, Alabama. However in reality, Anniston is about 50 miles from Goodwater, and Montgomery is only about 60 miles from Goodwater; thus, the travel distance is not necessarily any more inconvenient. The debtors had no extenuating circumstances which would make travel to the Middle District an undue burden on them.

As noted on prior occasions, this Court has jurisdiction to transfer venue of the instant case,

pursuant to section 157(b)(3) of the Bankruptcy Code, because this is a core proceeding arising in a title 11 case. *In re Henderson*, 197 B.R. 147, 150 (Bankr. N.D. Ala. 1996).

This Court finds the Northern District of Alabama, Eastern Division is not the proper venue for the debtors' instant case. Pursuant to section 1408(1) of Title 28, a bankruptcy case may be commenced in the district in of the debtors' domicile, residence, principal place of domestic business, or principal place of domestic assets for the requisite period set forth in the statute. The Debtors' residence, as listed on their petition, is 11310 Highway 63 North, Goodwater, Alabama 35072. There is no evidence in the record to suggest any prior residence during the requisite period that would give rise to venue in this District. According to the debtors' schedules, they own a mobile home and lot in Goodwater, Alabama. Thus, the Middle District of Alabama is the proper venue for the Debtor's case.

Upon finding the petition was filed in an improper venue, the Court must determine how to handle this case. Bankruptcy Rule 1014 states that a court may transfer a case "on timely motion of a party in interest . . . and after hearing on notice to the petitioners, . . . the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties. " As stated above, it appears to be no more inconvenient for the debtor to attend court in Montgomery rather than Anniston, as Montgomery is the proper legal division for this case and is only about 10 miles further away than Anniston. When determining whether the case should be transferred in the "interest of justice," the court must consider the following factors: "(1) economics of estate administration; (2) judicial efficiency; (3) ability to receive fair adjudication; (4) enforceability of judgment; and (5) original choice of forum." The debtors' previous cases were filed in the Middle District, and the debtors should not be permitted

to forum shop. The estate will be administered more efficiently in the District in which the debtors reside, and it appears the debtors might have filed bankruptcy in the Northern District because they have had four previous cases dismissed in the Middle District. Nevertheless, the debtors can receive a fair adjudication of their bankruptcy case in the Middle District, and there is no reason the case should not be transferred there. This court does not take business away from another district unless justice so requires.

Absent a request by a party in interest, this Court must consider if it can *sua sponte* transfer a case to the proper venue. In prior cases dealing with this same issue, this Court has answered the question in the affirmative. *See In re Henderson*, *supra*; *In re Langston*, 291 B.R. 872 (Bankr. N.D. Ala. 2003) (holding the Court has the power to transfer on its own motion a bankruptcy petition filed in the improper venue to the proper district). Bankruptcy courts have the authority to transfer improperly filed cases under 28 U.S.C. § 151, which names bankruptcy judges in a district "a unit of the district court." *Henderson*, 197 B.R. at 153. In addition, bankruptcy courts also may exercise certain district court powers "pursuant to the referral of cases to be heard and determined by the bankruptcy court." *Id.* at 153-54, *citing Burlingame v. Whilden (In re Whilden)*, 67 B.R. 40 (Bankr. M.D. Fla. 1986); *In re Oceanquest Feeder Serv., Inc.*, 56 B.R. 715 (Bankr. D. Conn. 1986); and *In re Waits*, 70 B.R. 591 (Bankr. S.D. N.Y. 1987).

Statutory law also favors transfer. Section 1404(a) of Title 28 provides, "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." A district court also may dismiss, or in the interest of justice, transfer a case filed in the wrong division or district. 28 U.S.C. § 1406(a). Section 1412 also governs transferring bankruptcy cases and provides, "A district court

may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. The Court has no evidence before it to suggest or support a finding contradicting binding precedent.

Based on the foregoing reasons and conclusions stated, it is ORDERED, ADJUDGED and DECREED that the debtors' case is to be transferred *sua sponte* to the correct venue of the Middle District of Alabama, Northern Division in Montgomery, Alabama. Pursuant to Fed. R. Bankr. P. 9021, a separate order consistent with this opinion will be entered in this case.

Dated: June 14, 2006

/s/ James J. Robinson

JAMES J. ROBINSON

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
	}	
MICHAEL L. DEW,	}	**CASE NO.: 06-40154-JJR-13**
	}	
Debtor,	}	**CHAPTER: 13**
	}	
In re:	}	
	}	
PAUL A. and BETTY M. ETRESS,	}	**CASE NO.: 06-40134-JRR-13**
	}	
Debtors,	}	**CHAPTER: 13**
	}	
In re:	}	
	}	
APRIL L. WILSON	}	**CASE NO.: 05-44792-JJR-13**
	}	
Debtor, and	}	**CHAPTER: 13**
	}	
In re:	}	
	}	
TONETT S. WELLS,	}	**CASE NO.: 06-40207-JJR-13**
	}	
Debtor.	}	**CHAPTER: 13**
	}	

AMENDED MEMORANDUM OPINION

The above cases came before this Court for confirmation of the respective Debtors' chapter 13 plans.[1] All these cases were filed after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") became effective. The chapter 13 Trustee filed an Objection to Confirmation with respect to each proposed plan. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(b). This is a core proceeding in

[1] The same attorney represents all the above Debtors. The Trustee's Objections to Confirmation of the plans proposed in these cases raise common issues, and the Trustee and Debtors' attorney combined their arguments and briefs on these issues. Accordingly, the Court is issuing this memorandum opinion covering the common issues in these cases.

accordance with 28 U.S.C. § 157(b).

THE PROPOSED PLANS, SCHEDULES I & J AND FORMS B22C

To fully analyze the issues presented, it is helpful to first examine some of the details of the proposed plans. In his plan, Debtor Dew proposes to pay $140 per week (increasing to $202.00 per week in June 2006) for 15 months. The payments will be applied exclusively to priority claims, attorney's fees and delinquent income taxes; general unsecured creditors will receive nothing. Dew proposes to pay a $1,000 secured claim directly to a secured creditor with monthly payments of $268.00. On Schedule J, Dew reports total monthly income of $3,243.33 (line 20 a) and total monthly expenses of $2,635.00 (line 20 b), leaving monthly net income of $608.33 (line 20 c). The Trustee asserts that Dew's plan should not be confirmed because the length of its proposed commitment period is less than three years, and he is not offering to contribute all of his monthly net income to the plan payments.[2]

Debtor Wilson proposes to pay $100.00 per month for 21 months. The plan is unclear as to how Wilson intends her payments to be applied. Her attorney's fees are $1,800.00, and she has scheduled a student loan as a priority claim in the amount of $9,301.56. While her student loan might not be discharged under section 522(a)(8) of the Bankruptcy Code (11 U.S.C. §§ 101 *et seq*, the "Bankruptcy Code" and the "Code"), it does not appear to be entitled to priority claim status under section 507 of the Code, as alleged by this Debtor. The total amount she proposes to pay over the life of the plan is only $2,100.00, significantly less than the fees of her attorney and her student loan. In any event, general unsecured creditors will receive nothing. On Amended Schedule J,

[2]The Trustee assigned additional reasons for her objection to confirmation of Dew's plan, including that his budget expenditures are excessive. This opinion only speaks to the objections based on the insufficient duration of the plan's commitment period and the Trustee's claim that Dew's budget is excessive.

Wilson reports total monthly income of $1,135.53 and total monthly expenses of $1,035.00, leaving monthly net income of $100.53. Like her objection to Dew's plan, the Trustee objects to confirmation of Wilson's plan on the grounds that it proposes payments over a term of less than three years.

The Etress Debtors propose to pay $232.00 per month for 36 months. The payments will be applied exclusively to their attorney's fees and the secured claim of the creditor holding a security interest in their automobile; general unsecured creditors will receive nothing. Schedule J discloses the Etress Debtors have total monthly income of $2,737.54 and total monthly expenses of $1,500.00, leaving monthly net income of $1,237.54.

Debtor Wells proposes to pay $1,008.00 per month plus $240.10 bi-weekly for 60 months. The payments will be applied exclusively to her attorney's fees and the secured claims of the creditors holding security interests in her home and automobile; general unsecured creditors will receive nothing. Schedules J discloses that Wells has total monthly income of $3,832.17 and total monthly expenses of $1,004.00, leaving monthly net income of $2,828.17.

All the Debtors included Forms B22C with their petitions for relief. Interim Rule 1007(b)(6) of the Federal Rules of Bankruptcy Procedure requires a chapter 13 debtor to report his or her current monthly income in Part I of Official Form B22C, and in Part II to determine whether or not this income is less or more than the median family income for the debtor's state and household size. If the income is greater than the applicable median, then disposable income must be calculated in accordance with section 1325(b)(3) of the Code by completing Parts III, IV and V of Form B22C. If income is less than the median, the instructions in line 14 of the Form tell the debtor not to complete the remainder of the Form other than the verification in Part VI.

In Part II of their Forms B22C, all of the Debtors in these cases reported that their current

monthly income was less than the median income for their applicable family size in Alabama. Nonetheless, contrary to the instruction in line 14, they each completed the entire Form B22C, including Parts III, IV and V. The calculations of disposable income in Forms B22C, as completed by the Debtors, leave each of them with negative monthly disposable income (i.e. Form B22C line 48).[3]

WHY CHAPTER 13 AND NOT CHAPTER 7?

Without making a detailed analysis, it appears from these Debtors' Schedules and Forms B22C, that all of them were eligible to seek relief under chapter 7 of the Bankruptcy Code with no presumption of abuse under section 707(b). If they had filed under chapter 7 most, and in some cases all, their debts would be dischargeable without further payment. So why did they file under chapter 13 which will require payments to the Trustee under a plan? The answer is simple. As is often the situation, a debtor files for relief under chapter 13 rather than 7 to cure outstanding defaults in secured debts such as home mortgages and automobile loans. This allows a chapter 13 debtor to take advantage of the automatic stay while curing defaults in secured debts and stop foreclosures and repossessions. It also halts the imposition of judgments and their enforcement through levy, execution and garnishment. At the end of a successful and completed chapter 13 plan, a debtor hopes to have cured defaults in his or her secured debts, and receive a discharge of general unsecured debts, even if these latter debts were not fully, or even partially paid under the plan.

Another example of why a debtor may choose chapter 13 and not 7 arises when a debtor finds

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[3] Even ignoring that these Debtors all have below median income, they failed to properly complete Parts III, IV and V of their Forms B22C. For example, most of the line item deductions allowed in Part III were left blank, no total deductions were inserted in lines 42, and it was impossible to reconcile the total of all allowed deductions on lines 46. Additionally, Debtors Dew and Wilson inserted the total amount of their proposed priority claims in line 39 without dividing that amount by 60 as instructed. Nonetheless, for purposes of this opinion any errors in completion of Forms B22C will be ignored, and it will be assumed that all of these Debtors would have negative monthly disposable income reported on line 48 if the form had been accurately completed.

that his or her exemptions are not sufficient to protect the unencumbered value in property the debtor desires to retain. This property would otherwise be subject to liquidation by a trustee in a chapter 7 case. Similarly, a debtor might have debts that would not be discharged under chapter 7, but under chapter 13 he can pay these debts over an extended period of time, thus avoiding harsh collection remedies which might be employed by creditors holding nondischargeable claims, e.g. domestic support obligations, delinquent income taxes and student loans. While the motives of the Debtors in these cases are not at issue, it appears that in most instances they are attempting to cure defaults on secured loans (e.g. Wells and Estress), and avoid or delay the enforcement of nondischargeable debt (e.g. Dew and Wilson). However, at the conclusion of their plans, these Debtors expect to receive a full discharge from the claims of their nonpriority, unsecured creditors, even though these creditors will receive nothing.

PLAN COMMITMENT PERIODS AND

PROJECTED DISPOSABLE INCOME FOR BELOW MEDIAN INCOME DEBTORS

Debtors Dew and Wilson propose plans with terms of less than three years. The term of Wilson's plan is 21 months, and Dew's is only 15 months, and neither plan proposes to pay anything to nonpriority, unsecured creditors. The Trustee contends that the Dew and Wilson plans cannot be confirmed over her objection because they do not satisfy the requirements of section 1325(b)(1) of the Bankruptcy Code. Section 1325(b)(1) states that when the trustee or a holder of an allowed unsecured claim objects to confirmation of a chapter 13 plan, "then the court may not approve the plan unless . . .

> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim [i.e. pay the claim in full]; or
>
> (B) the plan provides that all the debtor's *projected disposable income* to be

> received in the *applicable commitment period* beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." (emphasis added).

The Trustee then points to section 1325(b)(4), which defines "applicable commitment period" as three years for below median income debtors. She argues that because the Dew and Wilson plans are for periods of less than three years, they should not be confirmed.

Debtors Dew and Wilson contend that the duration or length of their plans is immaterial since they have no monthly disposable income reported on line 48 of their Forms B22C. According to Dew and Wilson, because they have no obligation to pay anything under Form B22C, the duration of their plans is of no consequence.

Section 1325(b)(2) provides that "disposable income" is determined by subtracting from "current monthly income"[4] the reasonably necessary expenses incurred for the maintenance and support of the debtors and their dependants, charitable contribution (within limits), and if the debtors are engaged in business, necessary business expenses. Thus, a debtor's current monthly income is the starting point for determining his disposable income under section 1325(b)(2). However, current monthly income is also important for two other reasons: (1) selecting the method for determining the expenses that will be subtracted from current monthly income to calculate disposable income, and (2) selecting the term or duration for debtor's plan, i.e. the applicable commitment period. If current monthly income, multiplied by 12, is greater than the applicable median, then the deductible expenditures for the calculation of disposal income are determined in accordance with section 707(b)(2)(A)&(B). Code § 1325(b)(3). Likewise, if the debtor's current monthly income, multiplied

[4]Generally speaking, current monthly income is defined in Code § 101(10A) as the average monthly income from all sources received by the debtor(s) during the six calender months immediately preceding the month in which the petition was filed.

by 12, is greater than the applicable median, then the applicable commitment period for his plan is five years, as opposed to three years for a below median income debtor. Code § 1325(b)(4). The only exception to the five and three year requirements is "if the plan provides for payment in full of all allowed unsecured claims over a shorter period." Section 1325(b)(4)(B).

For any particular debtor, disposable income in section 1325(b)(2) is not necessarily the same as projected disposable income in section 1325(b)(1)(B). See In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006). To hold otherwise would assign no meaning to the term "projected," which would be contrary to rules of statutory construction. However, exactly how and to what extent the adjective "projected" modifies disposable income is not an issue this Court needs to address before ruling on the Trustee's objections to confirmation of the Debtors' plans in these cases. It is enough to say that if a debtor's income and expenses have been relatively constant and there is no reasonable expectation of substantial changes or fluctuations (unlike the situation which arose in In re Beasley, 2006 WL 1228924, Bankr. C.D. Ill. May 8, 2006), then projected disposable income and disposable income will in virtually all, if not all, cases be the same.

As mentioned above, none of these Debtors has currently monthly income greater than the applicable median income. Thus, these Debtors' disposable incomes are not to be determined under the Form B22C formula, which was taken from Code § 707(b)(2)(A)&(B). If the Form B22C formula for determining disposable income is not applicable, how should a below median income debtor's disposable income be calculated? The answer appears to be the old fashioned way:

"Unlike the higher income debtor, it does not appear that Congress has mandated monthly net income as the presumptive amount debtors must pay into a chapter 13 plan, preserving judicial discretion in that respect. Accordingly, for debtors in this category one might correctly assume that the courts will continue to apply the pre-BAPCPA approach. " T. Yerbich, Consumer Bankruptcy

98 (2d ed. American Bankruptcy Institute 2005). This Court holds that in determining whether a below median income debtor is offering all of his projected disposable income under a plan, the first step, and in most cases the last step, is to look at the debtor's Schedules I and J. If the Schedules are accurately completed in good faith and plan payments are substantially the same as the debtor's monthly net income shown on Schedule J, then the Court will conclude that the debtor is offering his projected disposable income under his plan as required by Section 1325(b)(1)(B). If a party in interest contends that the amount of monthly net income shown on Schedule J of a below median income debtor should not be considered as the debtor's projected disposable income for the purposes of determining compliance with Code § 1325(b)(1)(B), then for this Court to approve a different amount, that party must be prepared to present credible evidence that proves monetary adjustments in exact amounts are necessary, without resorting to conjecture, opinion, speculation or hearsay. As stated above, in the overwhelming number of cases, the accurate information on Schedules I and J offered in good faith for below median income debtors will determine their "projected disposable income to be received in the applicable commitment period . . . ." Section 1325(b)(1)(B).

The plain meaning of section 1325(b)(4)(A) sets the applicable commitment period for below median debtors at three years. Where the words of the statute are clear and unambiguous, it should be interpreted as written. See Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); Dodd v. U.S., 545 U.S. 353 (2005). The Court is convinced that the three years referred to in section 1325(b)(4)(A) represents a period of time over which chapter 13 plan payments must be made, not a multiplier for use in calculating the total amount to be paid under the plan regardless of its term. The hanging paragraph at the end of Code § 1322(d)(2) states, "the plan [of a below median income debtor] may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period," not to exceed five years. A plan modification made pursuant to section

1329(c) "may not provide for payments over a *period that expires* after the *applicable commitment period* under section 1325(b)(1)(B) after the *time* that the first payment under the original confirmed plan was due, unless the court, for cause, approves a *longer period* . . . ." (emphasis added). Inasmuch as sections 1322(d)(2) and 1329(c) deal with extending the duration of a plan confirmed under section 1325, the only logical conclusion is that the applicable commitment period under section 1325(b)(4)(A) must be a period of time: either three or five years, depending on the median income of the debtor. It is impossible to read sections 1322(d)(2), 1325(b)(4)(A) and 1329(c) and conclude the Bankruptcy Code contemplates something other than a defined length of time for payments to be made under a chapter 13 plan, i.e. the applicable commitment period.[5] When a below median income debtor has positive monthly net income shown on his Schedule J, even if he would have no monthly disposable income under Form B22C, in virtually all cases an amount substantially equal to such monthly net income will be considered the debtor's projected disposable income for the purposes of Code § 1325(b)(1)(B). Thus, a plan proposed by a debtor with a commitment period of less than three years should not be confirmed over the objection of the Trustee or an unsecured creditor, unless the plan will pay unsecured creditors in full in less than three years.

COMMITMENT PERIODS FOR DEW'S AND WILSON'S PLANS

Over the proposed 15-month term of Debtor Dew's plan, he will pay a total of $9,100. If his

[5]Similarly, Code § 1322(a)(4) provides for the payment of section 507(a)(1)(B) priority claims over a "5-year period," the maximum allowed term of a chapter 13 plan. Further, calculations made under Code § 1326(b)(3)(B)(ii) utilize the "number of months in the plan."

commitment period is increased to three years, his total will increase to approximately $21,840.[6] Similarly, Debtor Wilson's 21-month plan will pay a total of $2,100, but if the commitment period is increased to three years, her total payout becomes $3,600.[7] Accordingly, the Trustee's objections to the plans proposed by Debtors Dew and Wilson are due to be SUSTAINED, because both plans fail to propose payments over the applicable commitment period of three years, and neither will pay unsecured creditors in full over their abbreviated terms.

PROJECTED DISPOSABLE INCOME OFFERED BY ETRESS AND WELLS PLANS

The plan proposed by Debtor Etress has a commitment period of three years, and the Wells plan has a term of five years. The Trustee is not objecting to the length of the commitment periods of these two plans.[8] However, the Trustee contends the Etress and Wells plans do not offer to pay all the projected disposable income of their respective Debtor. A comparison of the proposed plan payments with the reported monthly net incomes on Schedule J supports the Trustee's objections to confirmation.[9] Thus, the Trustee's objections to confirmation of the plans proposed by Debtors

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[6]Dew's plan payments calculated on a monthly basis are approximately $606, and his monthly net income show on Schedule J is $608. Assuming the income and expenditures used to complete Schedules I and J are accurate and offered in good faith, it appears the proposed periodic payments would substantially comply with section 1325(b)(1)&(2) for 15 months, but the proposed commitment period of 15 months is 21 months short from that required by section 1325(b)(4)(A).

[7]Wilson's Schedule J reports monthly net income of $100. Thus if her income and expenditures used to complete her Schedules I and J are accurate and offered in good faith, it appears her monthly contribution is sufficient, but the term of the plan must be increased to three years.

[8]Section 1322(d)(2) limits the term of a below median income debtor to no more than three years unless the court, for cause, approves a longer period not to exceed five years. The Wells plan proposes a commitment period of five years, although the Debtor has not sought and the Court has not approved a longer period. This Court makes no ruling on the consequences, if any, of a commitment period extending beyond three years for a median income debtor where, as here, the Court has not approved the longer period and neither the Trustee nor any other party in interest has objected to the longer period.

[9]The Trustee contends that the budget proposed by Debtor Dew is excessive, resulting in his plan not offering to pay all of his disposable income. The Court assumes the Trustee is complaining the expenditures shown on Dew's Schedule J are excessive, and that if they were reduced to reasonable amounts there would be a

Etress and Wells are SUSTAINED, because they do not offer all of the Debtors' disposable income to be received during the applicable commitment period. Code § 1325(b)(1)(B).

Separate orders consistent with this opinion will be entered in each of these cases. The Clerk will be directed to re-schedule each case for plan confirmation and consideration of whatever proof the parties might wish the Court to review in support of, or in opposition to confirmation, consistent with the opinions expressed herein. The Debtors are granted leave to amend their proposed plans to comply with this opinion.

Dated: June 21, 2006

/s/ James J. Robinson
JAMES J. ROBINSON
United States Bankruptcy Judge

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corresponding increase in the monthly net income available to make payments to unsecured creditors. Without further proof, the Court makes no findings regarding the expenditures reported on Dew's Schedule J. This issue as it applies to this Debtor will be determined when a hearing on confirmation is re-scheduled.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
	}	
PHILLIP A. TALLEY and	}	**CASE NO.: 05-44442-JJR-13**
	}	
JULIE A. TALLEY,	}	**CHAPTER: 13**
	}	
Debtors.	}	
	}	
	}	
PHILLIP A. TALLEY	}	
	}	
Plaintiff,	}	
	}	
v.	}	**A.P. No. : 06-40038-JJR**
	}	
ALABAMA DEPARTMENT OF PUBLIC SAFETY and W. M. COPPAGE, IN HIS OFFICIAL CAPACITY	}	
	}	
Defendants.	}	

MEMORANDUM OPINION

This matter came before the Court on the Motion to Dismiss Complaint filed by the defendants, Alabama Department of Public Safety ("DPS") and W. M. Coppage, the Director of DPS (together with DPS, the "Defendants"). The Court has reviewed the statement of facts filed by debtor-plaintiff, Phillip A. Talley ("Talley" and the "Plaintiff") and the Defendants [docket nos. 10 and 11, respectively], the Defendants' Brief in Support of Motion to Dismiss [docket no. 18] and Talley's Memorandum [docket no. 19].

The issue before this Court is whether the suspension of Talley's driver's license, while he was a debtor in a chapter 13 bankruptcy case, was a violation of the automatic stay in effect pursuant to 11 U.S.C. § 362. This Court has jurisdiction over the subject matter and the parties pursuant to

28 U.S.C. §§ 1331 and 157(b). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

On October 14, 2005 the Plaintiff and his wife (jointly, the "Debtors") filed a joint petition for relief under chapter 13 of the Bankruptcy Code (11 U.S.C. § 101 *et seq*, the "Bankruptcy Code"). The Debtors' Schedule F lists eight unsecured debts, all of which are fines for traffic violations owing by the Plaintiff to municipalities and state district courts (i.e. traffic courts). The fines total $3,280.50. None of the fines appear to be owing by the Plaintiff's wife, and it is unclear why she is also a debtor in this case. Nonetheless, the Debtors' chapter 13 plan proposes to pay 100% of the fines, plus administrative expenses through monthly installments of $105.00 each over a 60 month commitment period. The plan was confirmed on December 19, 2005. The issue of whether the filing was made in good faith is not before the Court; however, if that issue had been timely raised, the lack of creditors other than those to whom the traffic fines are owing, might have given the Court pause to consider whether the purpose of this case was to avoid the consequences of failing to pay the fines, a purpose for which the relief offered by the Bankruptcy Code was not intended.

On August 11, 2004 and January 3, 2005, the Plaintiff was found guilty, or plead guilty, in St. Clair County District Court (the "District Court") of driving without a license and speeding, respectively. The Plaintiff failed to pay the court ordered fines relating to these offenses. On November 3, 2005, pursuant to Rule 26.11(I)(3) of the Alabama Rules of Criminal Procedure, the District Court ordered the suspension of the Plaintiff's driver's license. The Administrative Office of Courts forwarded the District Court's order to DPS, and on November 7, 2005 (after the Debtors' bankruptcy case was commenced but before the Debtors' chapter 13 plan was confirmed), DPS suspended the Plaintiff's license. On January 24, 2006 the Plaintiff instituted this adversary proceeding alleging the suspension of his driver's license by the Defendants violated the automatic stay imposed by section 362 of the Bankruptcy Code.

This Court is of the opinion that the Defendants' action fell within the exception to the automatic stay set forth in section 362(b)(1)[1]. Section 362(b)(1) states that: "[t]he filing of a petition . . . does not operate as a stay under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor . . . ." 11 U.S.C. § 362(b)(1). Courts considering this issue have found the incarceration of a debtor during his bankruptcy case is not a violation of the automatic stay if the incarceration results from the non-payment of criminal fees and costs. In re Perez, 220 B.R. 216 (Bankr. D.N.J. 1998) (incarceration for failure to pay fines for pre-petition traffics offenses not an attempt to collect debt but continuation of criminal proceeding); In the Matter of Cuevas, 205 B.R. 457 (Bankr. D.N.J. 1997); In the Matter of Sims, 101 B.R. 52 (Bankr. W.D. Wis. 1989).

In the Sims case, the initial charge brought against the debtor, fleeing an officer, was punishable by either payment of a fine or incarceration. 101 B.R. 52. The debtor opted to set up an installment plan to pay the court imposed fine rather than go to jail. The debtor defaulted, which resulted in his incarceration. The Bankruptcy Court in Sims found that "where a convicted defendant is sentenced to a monetary penalty in lieu of a jail term, and then defaults, the incarceration of the defendant is the continuation of the underlying criminal proceeding." Id. at 55. This Court agrees.

Like the debtor in Sims, the Plaintiff in the instant case has pre-petition fines imposed by the District Court for offenses contained in Title 32 of the Code of Alabama. Under Alabama law, when a licensed driver fails to pay a fine the state court has the option of incarcerating the driver under Rule 26.11(I)(1) of the Rules of Criminal Procedure, or suspending the driver's license under Rule

[1]Because the actions taken by the Defendants fall within an exception to the automatic stay, this Court need not address the Defendants' additional arguments that St. Clair County is the proper defendant in this adversary proceeding, and the consequences, if any, of the Plaintiff serving a suggestion of bankruptcy after the District Court ordered the revocation of the Plaintiff's license.

26.11(I)(3). In respect to the Plaintiff, the District Court ordered the revocation of his license. Here, upon the Plaintiff's default on his monetary obligations (originally ordered in lieu of incarceration), the District Court had two options: incarceration or revocation of the Plaintiff's driver's license. Certainly if the District Court could incarcerate the Plaintiff upon his default, and such incarceration would be a continuation of criminal proceedings, it could also revoke the Plaintiff's driver's license as a continuation of criminal proceedings. At least one other court within the Eleventh Circuit has held that the post-petition revocation of a suspended jail sentence resulting from a debtor's failure to make payments constitutes the continuation of a criminal proceeding where the underlying charges were criminal. Rollins v. Campbell (In re Rollins), 243 B.R. 540 (N.D. Ga. 1997).

Based on the plain language of 11 U.S.C. § 362(b)(1) and foregoing authorities, this Court is of the opinion that the Defendants' revocation of the Plaintiff's driver's license for failure to pay fines was the continuation of a criminal proceeding and was not prohibited by the automatic stay.

The Plaintiff's reliance on Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) is misplaced. In Davenport, the Supreme Court held that criminal restitution obligations were "claims" or "debts" for bankruptcy purposes and therefore could be discharged in bankruptcy. Id. at 564. Though dicta in Davenport suggests that the exclusion contained in section 362(b)(1) permitting the continuation of criminal proceedings might not apply to the continuation or enforcement of restitution orders, the holding in Davenport is limited to whether restitution obligations are dischargeable and does not address the automatic stay issue. See Bryan v. Rainwater, 254 B.R. 273 (N.D. Ala. 2000) (no violation of automatic stay where probation revocation hearing relating to restitution delinquency held during pendency of bankruptcy case). Additionally, the holding in Davenport has since been superceded by statute. In 1990, Congress

amended the Bankruptcy Code to expressly prohibit discharge of restitution obligations. 11 U.S.C. § 1328(a)(3).

In conclusion, the Defendants' suspension of the Plaintiff's driver's license was not a violation of the automatic stay because it falls within the exception contained in section 362(b)(1). Inasmuch as there was no violation of the automatic stay, the Defendants' Motion to Dismiss Complaint is due to be granted.[2] The Court will issue a separate order consistent with this opinion pursuant to Fed. R. Bankr. P. 9021.

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[2]The facts in this case are unique. The Plaintiff's only creditors are those to whom fines for traffic violations are owing, and there are eight such creditors. There are no debts for credit cards, car payments, mortgages, high interest quick-cash advances, medical bills, domestic support obligations, taxes and other debts typically found on debtors' schedules, and relief from which the Bankruptcy Code was intended. The Plaintiff cannot even plead that he needs a license in order to drive to work: he is unemployed and his only income is from social security disability. If the Plaintiff had only one outstanding fine, maybe even two, and was unable to pay them because of the burden of other more typical debts, then perhaps this Court might be more sympathetic to his plight. Nonetheless, even if the Plaintiff's situation had been more typical, there probably is little if any relief that this Court is authorized to provide. This Court would look closely at a case where a debtor with more typical debts, that includes a traffic fine, proposes a chapter 13 plan that will pay the fine along with other debts over an appropriate commitment period, and after sufficient notice the plan is confirmed without objection by the governmental authority imposing such fine. If that authority, post confirmation, attempts to impose alternative punishment because the fine will be paid over the term of the commitment period rather than immediately in one lump sum, it could be argued that the imposition of such alternative punishment might violate section 1327(a) rather than section 362(a). The facts in the Plaintiff's case do not come close to matching those just hypothetically described. The answer to the question of whether section 1327(a) might trump section 362(b)(1) will have to wait for another case with different facts. In any event, what this Court and other Bankrupty Courts should avoid is becoming unofficial courts of appeal from convictions in traffic and criminal courts punished by fines that, if not paid, result in incarceration or, as in this case, revocation of a driver's license. When Congress inserted section 362(b)(1) as an exception to the automatic stay, it underscored that Bankruptcy Courts are not to interfere in the state criminal justice process. The state criminal justice system, including the Department of Public Safety and the criminal courts, is exceedingly better situated and qualified to determine how crimes, violations and infractions should be punished, including when defendants should loose the privilege of holding a driver's license. In some instances, as is possibly the case here, it is not just a matter of punishment, but public safety.

Dated: July 27, 2006

/s/ James J. Robinson
JAMES J. ROBINSON
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
	}	
Steven T. Estrada,	}	**CASE NO. 05-42028-JJR-13**
	}	
Debtor(s).	}	**CHAPTER: 13**
	}	
	}	
Steven T. Estrada,	}	
	}	
Plaintiff(s),	}	**ADV. P. NO.: 06-40007**
	}	
v.	}	
	}	
Donna Estrada,	}	
	}	
Defendant/ Counter Claimant	}	
	}	
v.	}	
	}	
Steven T. Estrada,	}	
	}	
Counter-Defendant.	}	

Memorandum Opinion

The Debtor-Plaintiff, Steven Estrada (the "Debtor"or "Plaintiff") filed chapter 13 bankruptcy on June 13, 2005, and commenced this adversary proceeding on January 11, 2006. Debtor's chapter 13 plan provided for the sale of his house with the net proceeds to be paid to the Chapter 13 Trustee and distributed to allowed claim holders. The Debtor's house (the "house" or "property") was owned by him prior to his marriage to the Defendant/Counter-Claimant, Donna Estrada (the "Defendant"), and was their common homestead while they lived together as husband and wife. After the parties separated, the Plaintiff moved out of the house, but the Defendant and her adult son from a previous marriage continued to live in the house until shortly before it was sold.

The Plaintiff's complaint alleges that the Defendant: (i) interfered with the sale of the house by not allowing the real estate agents reasonable access to show the property to prospective buyers,

(ii) caused the purchaser of the house to significantly reduce the price he was willing to pay because the Defendant removed various appliances from the house before the sale closed, and because the Defendant failed to dispose of trash which she left at the property when she moved, and (iii) delayed the sale of the house, thus causing the mortgage payoff to unnecessarily increase because of additional accrual of interest. The Plaintiff alleges the Defendant should be held in contempt for interfering with this court's order confirming the Debtor's chapter 13 plan, which called for the sale of the house, and that her actions violated of the automatic stay. The Plaintiff seeks damages of $70,000 plus attorney's fees and costs.

The Defendant denies interfering with or delaying the sale of the house. She alleges she was entitled to remove the appliances, and she asserts a counterclaim against the Plaintiff for the loss of a 1974 Chevrolet Nova taken from the yard of the property without the Defendant's permission. In her counterclaim the Defendant seeks $100,000 in compensatory and punitive damages.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 157 and 1334 and the Order of Reference of the District Court. This adversary proceeding and counterclaim are core proceedings pursuant to 28 U.S.C. § 157(b)(2). For the reasons stated below, the Court is denying recovery on any of the claims presented in the Plaintiff's complaint and the Defendant's counterclaim.

For the most part, this adversary proceeding and counterclaim are extensions of a very acrimonious divorce proceeding between the parties that was commenced in 2003 and is still on-going with little or no progress having been made toward a final divorce decree or determination of property rights. Neither the Debtor nor the Defendant presented evidence that a divorce decree has been entered by the state domestic relations court in which their divorce proceedings is pending (the "State Court"). Moreover, neither party has sought relief from the automatic stay of 11 U.S.C. § 362(a) for the purpose of allowing the State Court to determine an appropriate division of property in which the Debtor's bankruptcy estate and the Defendant share an interest. *Cf* 11 U.S.C. § 362(b)(2)(A)(iv). Thus, this Court must conclude that the Plaintiff and the Defendant remain husband and wife, and there has been no determination and division of property rights between the parties. The Defendant made no claim that she had any interest in the house or its sale proceeds, and asserted no objection to the Debtor's chapter 13 plan that calls for such proceeds to be paid to his creditors. So this Court must also conclude that when and if there is a determination of the property rights between the parties, it will not concern the house or its sale proceeds. Finally, in light of the

parties' apparent lack of interest in having a determination made of their respective property rights, the Court doubts that either party will ever seek relief from the stay for the purpose of going forward with such a determination in State Court.

At the trial held on August 9, 2006, Mrs. Mary Jo West, a real estate agent employed to sell the house, testified that the typical value of homes in the neighborhood where the house was located, was approximately $109,000. Mrs. West stated that because of the condition of the house, she believed it would sell in the range of $82,000 to $84,000. Mrs. West testified there was "deferred maintenance," including a patched roof, a disabled vehicle in the front yard (the Defendant's 1974 Nova), and the property needed landscaping and cleaning. Thus, the house was priced at $84,900 for a quick sale to a potential buyer who, according to Mrs. West, would likely acquire the property as an investment.

Real estate agent West stated she experienced problems showing the house to prospective buyers because the Defendant would not allow the property to be shown unless the Defendant was present, and would not allow the house to be shown during convenient day-time hours. Mrs. West also complained that while the house was being shown, the Defendant would make derogatory remarks about the property's condition.

The Defendant testified that she did not feel comfortable having strangers in her home while she was not present. She also stated that she wanted to be home when the house was shown because her son worked a night-shift and slept during the day, and she did not want him disturbed. The Defendant averred that she did accommodate agent West by leaving her place of employment during her lunch hour to meet West and potential buyers at the property. She explained that her derogatory, but truthful, remarks about the condition of the property were in response to pointed questions posed by a potential buyer. The Defendant testified that she met agents, other than Mrs. West, at the property to accommodate an inspection by potential buyers, and that on at least one occasion, agent West made an appointment to show the property but failed to keep the appointment.

There was no evidence explaining why the Defendant remained in the house while it was being offered for sale by the Debtor's estate. Perhaps the Defendant remained by agreement of the parties, or under an order from the State Court. Whatever the reason, there was never any request made of this bankruptcy Court seeking removal of the Defendant from the house.

After hearing the testimony of agent West and her husband (also a real estate agent), and that of the Plaintiff and Defendant, it is obvious to the Court that the Defendant did not "bend over

backwards" to accommodate the real estate agents who wanted to show the property to potential buyers. Whether her lack of cooperation amounted to interference with the consummation of the Debtor's chapter 13 plan or violated the automatic stay is difficult to determine from the evidence presented. More importantly, it would be speculation to conclude that if the Defendant had been more cooperative, the property would have sold sooner and for more money.

Before leaving the issue of the Defendant's cooperation or lack thereof, the Court will point out that there was no explanation offered by the Plaintiff as to why he did not take time off from his employment or otherwise make himself available to allow the property to be shown to potential buyers. After all, the property being sold was property of the Debtor's estate, and his creditors would be receiving the sale proceeds. Perhaps the Plaintiff was prohibited by an order of the State Court from coming onto the property while the Defendant, his wife, lived there. There was no evidence to explain why the burden of accommodating the real estate agent and potential buyers should fall on the Defendant. Perhaps there was a good reason, but no evidence was offered for the Court to consider regarding that issue.

Accordingly, based on the evidence the Court considered credible, the Court cannot conclude that the Defendant's conduct in connection with the efforts to sell the house reached a level of culpability that should result in her being held in contempt of the order confirming the Debtor's chapter 13 plan that provided for the house to be sold, or constituted a violation of the automatic stay.

In any event, an offer to purchase the house for $72,500 was eventually received by an interested party, subject, however, to a final inspection. Although neither the Plaintiff nor the Defendant provided the Court with a copy of the contract evidencing this offer, the Debtor filed a notice of intent to sell the property on January 13, 2006 (Doc. No. 56) and a copy of a contract dated January 12, 2006 (the "first contract") was filed with the motion. The first contract contained a purchase price of $72,500 and was signed by Gary Couvillion as purchaser. On March 13, 2006 the Court entered its order approving the sale for $72,500 (Doc. No. 76).

The proposed sale for $72,500 did not close. On April 18, 2006 the Debtor filed another notice of intent (Doc. No. 86) to sell the property to the same purchaser, but this time for a purchase price of $64,000. And although neither party provided the Court with a copy of the contract evidencing the $64,000 sale, a contract dated April 16, 2006 (the "second contract") was filed with the motion seeking Court approval of the sale. On May 17, 2006 the Court entered its order

approving a sale under the second contract (Doc. No. 96).[1]

Under paragraph 14 of the first contract, the purchaser checked the box that indicated he required a "home inspection." The first contract provided that within three business days of completing the inspection, the purchaser would provide the seller with a written list of conditions he wanted corrected. If the inspection revealed major defects or conditions unsatisfactory to the purchaser, he was entitled to terminate the contract. No such list of the conditions the purchaser wanted corrected was offered as evidence at trial, and the Court was not informed if the purchaser ever provided such a list to the Debtor or his agent. Under the second contract, the purchaser did not require a similar inspection, but in a handwritten provision he did require a "walk thru the day of closing to make sure that the home [was] in the same condition as [at] the time of [the] home inspection." Since no home inspection was required under the second contract, the Court assumes the reference to the home inspection was the inspection made under the first contract.

The second contract, unlike the first, contained a "Personal Property Addendum" on which was listed the items of personal property that were to be sold with the house. No such addendum was attached to the first contract, the purchaser was not called as a witness, and there was otherwise no direct evidence (that is, evidence other than hearsay and speculation) of the purchaser's expectations regarding what items of personal property he considered as being included under the first contract. In any event, after the inspection the purchaser withdrew his $72,500 offer under the first contract, and reduced his offer to $64,000 under the second contact. There was no disagreement that the house finally sold for $64,000.

The Plaintiff claims the purchaser reduced his offer from $72,500 to $64,000 because several appliances had been removed from the house and because there was a significant amount of trash left in the house after the Defendant and her son vacated it. The purchaser was not called as a witness at trial, thus the Court will not speculate what caused the purchaser to reduce his offer from $72,500 to $64,000. Perhaps the removal of appliances and the trash left by the Defendant had a bearing on the purchaser's decision to reduce his offer; however, there was also evidence that during

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[1]The copies of first and second contracts attached to the motions seeking approval of the respective sales were only signed by the purchaser, and not by the Debtor. Perhaps the Debtor signed the contracts after obtaining Court approval. In any event, the failure of the Debtor to sign the contracts, if in fact he never signed them, was not an issue between the Debtor and Defendant. It is unknown if this was an issue between the purchaser, who refused to close under the first contract, and the Debtor.

his inspection the purchaser became concerned with evidence of a potential moisture problem not previously discovered and the condition of the HVAC system. Additionally, the Defendant testified that a large portion the trash left behind consisted of clothes and other personal property belonging to the Plaintiff and his children.

The Defendant admitted to removing the stainless steel kitchen sink, a fan/light combination fixture, a stove, a refrigerator, a washer, a dryer, and two freezers. Initially the Plaintiff claimed the Defendant also wrongfully removed the dishwasher and a light fixture located in or near the kitchen. The Defendant testified that after the Plaintiff moved, but before the house sold, the dishwasher stopped working, was leaking, and was finally put in the trash and hauled away. The Plaintiff did not further contest the Defendant's explanation of why the dishwasher was missing. Also no longer an issue is a broken light fixture located in or near the kitchen area. Because that fixture had been removed during renovations and before the parties' separation, the Defendant had no duty to replace it. That leaves at issue the missing kitchen sink, the fan/light combination, the stove, the refrigerator, the washer, the dryer, and two freezers.

The Defendant testified that she displayed a conspicuous message board on which she listed the appliances she intended to remove from the house and that would not be sold. There was no evidence offered regarding whether the purchaser was shown this message board, although it could be inferred that during an inspection of the house it would have been seen by a potential purchaser. Additionally, it was never clear exactly what appliances were listed on the message board.

The Defendant testified she removed the steel kitchen sink because it was hers prior to the marriage and before she moved into the house. She stated that she purchased a replacement sink made of fiberglass and left it at the house, but never had it installed or connected to plumbing.

The Defendant testified that she told the real estate agents she intended to take the light/fan combination fixture because it was a wedding present. Agent West testified that while it is not uncommon for light/fan fixtures to be removed when a house is being sold, the buyer should be informed it is not being sold with the house, and if removed, it should be replaced with a fixture of like kind. The Defendant offered little or no explanation of why she took the other appliances. The Court assumes she believed she was entitled to these items and was effectuating her view of an equitable property settlement.

Alabama law generally holds that "when a divorce decree is granted without any mention of the division of the parties' jointly owned property, each party retains the same right, title, claim,

or interest therein which they held prior to the divorce. In essence, when the trial judge does not alter ownership that, in and of itself, disposes of the issue, and title to the property is left undisturbed by the judgment." Hocutt v. Hocutt, 491 So. 2d 247, 249 (Ala. Civ. App.1986), citing Dominex, Inc. v. Key, 456 So. 2d 1047 (Ala.1984); Coffelt v. Coffelt, 390 So. 2d 652 (Ala. Civ. App.1980). Though no divorce decree has been entered in this case dividing the property, the above case law is still applicable. Thus, each party retains his or her ownership in the property as was held prior to initiation of the divorce proceedings. There lies the problem with deciding this case. Who owned the light/fan combination, stove, refrigerator, freezers, washer and dryer? For some of these appliances, the Plaintiff had invoices or a proof of purchase in his name. But when a husband and wife purchase property for their common household use, the name of one of them on a sales receipt does not prove ownership. Other than the kitchen sink, both parties confirmed that all these removed appliances were acquired during or at the time of the marriage (the fan/light combination being a wedding present). If the appliances removed by the Defendant were not fixtures and thus not part of the Plaintiff's house, who is to say these appliances would not ultimately be determined to be the property of the Defendant if the State Court was ever asked to make a determination of an appropriate division of property between the parties?

Because there has been no judicial or agreed determination of the ownership of the marital property we do not know who owned the appliances when they were removed. If they were property of the Debtor's estate, then their removal was a violation of the automatic stay. The answer is probably that the appliances belonged to both the Plaintiff and Defendant under joint ownership. That joint ownership continues until there is a divestiture of one party's title through a division of their marital property, either by agreement or by judicial determination. This federal bankruptcy Court is not going to make that determination in this case. After hearing the testimony of both the Plaintiff and Defendant, it is abundantly clear that this adversary proceeding is, for the most part, a continuation of the parties' contested divorce proceedings. The parties have come to the wrong court for a ruling on a division of their personal property acquired during their marriage.

Nonetheless, even if this Court were to make a determination that the appliances removed by the Defendant were property of the estate, there was no credible evidence of the values of these appliances, or of the resulting reduction in the sale price of the house. The Plaintiff and agent West gave their opinions of the value of used stoves and refrigerators, which sounded to the Court to be mere guesses. Neither testified regarding the make, model, or condition of these appliances, or the

basis of their opinions. And even if the Court were to accept their opinions in respect to the stove and refrigerator, there was absolutely no evidence offered to prove the value of the fan/light combination, sink, washer, dryer or freezers.

As mentioned above, there was no direct evidence proving that the purchaser of the house reduced his offer by $8,500 because of the missing appliances and trash left by the Defendant. Obviously, a clean house with all appliances is worth more than one with trash and without appliances, but there was evidence of other conditions which might have contributed to the purchaser's reduced offer. The Court will not guess how much of the reduction was attributable to the actions of the Defendant and how much to other causes. Moreover, is the amount the price was reduced the correct measure of damages? The Plaintiff did not have to accept the $64,000 offer under the second contract. The price the property ultimately sold for does not establish its value. While agent West offered a range within which she expected the property to sell, she never gave her opinion of the property's value, and more importantly, never gave her opinion of its value with the appliances in place and the trash removed, compared with the condition it finally sold for after the appliances were removed and trash was not. One measure of damages for the wrongful removal of the appliances and failure of the Defendant to remove the trash (assuming she had a duty to remove the trash) would be the loss in the property's value due to the Defendant's actions, i.e. the difference in the value of the house with the appliances in place and the trash removed compared to its value without the appliances and with the trash remaining. Another measure of damages, already discussed above, would be the replacement values of the appliances and expense of removing the trash. In any event, damages were not proven, and the Court will not speculate by arbitrarily setting damages, especially in a case where the motives of the parties are questionable. Because the Court concludes that the evidence of the amount of damages is too speculative or nonexistent, there is no need to labor with the issue of whether the appliances were property of the estate. The foregoing conclusion is equally applicable to both the value of the appliances themselves and the value the house might have lost due to the removal of the appliances and failure to remove the trash.

If there had been credible evidence of values, the removal of the kitchen sink and possibly the stove would have raised an issue for this bankruptcy Court even if the ownership of the other appliances was left undetermined. The original sink, though purchased by the Defendant, became a fixture and part of the house, which was property of the estate. If the stove was "built-in" as opposed to being "free standing" (there was a conflict in the evidence regarding whether the stove

was built-in or free standing), it too could be classified as a fixture and part of the house. A fixture is "an article that was once a chattel, but which, by being physically annexed or affixed to realty, has become assessory to it and 'part and parcel of it.'" Ex parte Brown, 485 So. 2d 762, 764 (Ala. Civ. App. 1986), citing Milford v. Tenn. River Pulp & Paper Co., 355 So. 2d 687 (Ala.1978). Removal of the sink, and possibly the stove, were a violation of the automatic stay and an unlawful appropriation of property of the estate. However, no evidence was provided regarding the sink's value, or credible evidence of the stove's value, or the loss in value suffered by the house as a result of their removal.

The Plaintiff also testified that his mortgage balance increased as a result of the delayed closing caused by the Defendant. The Plaintiff testified that at time of the first offer on the house, his mortgage balance was $46,114.70. By the time the sale closed, not only had the price been reduced, the mortgage balance had increased to $47,092.65. While defendant's attorney proffered testimony that the difference between those amounts is $1,611.83, the actual difference is $977.95. However, as discussed above, we do not know if the purchaser withdrew his offer under the first contract and the closing was delayed because of the Defendant's conduct or if it was because of other reasons not attributable to the Defendant. Unfortunately, the purchaser did not testify, so we do not know his reasons. Accordingly, the Court will not award damages for the delay in closing between the first contract and the second contract. To do so would be too speculative based on the evidence presented.

The final issue to be addressed is the Defendant's counterclaim. The 1974 Chevrolet Nova was wrecked in 1998 and had remained in the property's front yard ever since. Though the Defendant admitted the vehicle was not driveable in its wrecked condition, she believed the car did have value as a vintage collector's item, and removal of the vehicle caused her monetary damages. The testimony of the parties was conflicted, and there was insufficient evidence for the Court to find the car was removed under the direction of the Debtor. Although the Debtor likely made the phone call to the city to ask about removing an abandoned vehicle, the Defendant did not prove the two men who removed the vehicle were in fact from the city or otherwise acting at the direction of the Debtor. In addition, no evidence was presented regarding the value of the wrecked, rusted, and unworkable vehicle, thus the Court is unable to award damages even if it could establish liability. Frankly, the Court believes the counterclaim was more of a defensive tactic and, like the Plaintiff's complaint, had more to do with the parties' matrimonial battles than their desire to be reasonably

compensated for their losses. Bankruptcy courts are not domestic relations courts, and the Eleventh Circuit has admonished bankruptcy courts to not meddle in family law matters traditionally left to the expertise of state courts. Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992).

Because there was insufficient evidence for the Court to assess and award damages, attorneys fees, and costs, in respect to any and all the claims asserted by the Plaintiff, it is Ordered, Adjudged, and Decreed that a judgment should be entered in favor of the Defendant and against the Plaintiff in this adversary proceeding on all claims asserted in the Plaintiff's complaint. Likewise, because there was insufficient evidence for the Court to assess and award damages, attorneys fees, and costs, in respect to any and all claims asserted by the Defendant/Counter-Claimant, it is Ordered, Adjudged, and Decreed that a judgment should be entered in favor of the Plaintiff and against the Defendant-Counter-Claimant in this adversary proceeding on all claims asserted in the Defendant's/Counter-Claimant's counterclaim. An separate judgment shall be entered reflecting the above opinion of the Court.

Dated: September 7, 2006

/s/ James J. Robinson
JAMES J. ROBINSON
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

In re:	}	
	}	
Steven T. Estrada,	}	**CASE NO. 05-42028-JJR-13**
	}	
Debtor(s).	}	**CHAPTER: 13**

	}	
Steven T. Estrada,	}	
	}	
Plaintiff(s),	}	**ADV. P. NO.: 06-40007**
	}	
v.	}	
	}	
Donna Estrada,	}	
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Defendant/	}	
Counter Claimant	}	
	}	
v.	}	
	}	
Steven T. Estrada,	}	
	}	
Counter-Defendant.	}	

JUDGMENT AND ORDER

In accordance with the Memorandum Opinion entered this day, it is hereby ORDERED that the Plaintiff is not entitled to recover any sums in this adversary proceeding, and judgment is hereby entered in favor of the Defendant and against the Plaintiff on all claims asserted in the Plaintiff's complaint. It is further ORDERED that the Defendant/Counter-Claimant is not entitled to recover any sums in this adversary proceeding, and judgment is hereby entered in favor of the Plaintiff and against the Defendant/Counter-Claimant on all claims asserted in the Defendant's/Counter-Claimant's counterclaim. Each party shall bear his or her own cost as previously paid. The Clerk of the Court is directed to close this adversary proceeding.

Dated: September 7, 2006

/s/ James J. Robinson
JAMES J. ROBINSON
United States Bankruptcy Judge